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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 171.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD COMPANY, a Corporation, *Petitioner*,

v.

THOMAS M. BROOKS, *Respondent*.

BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

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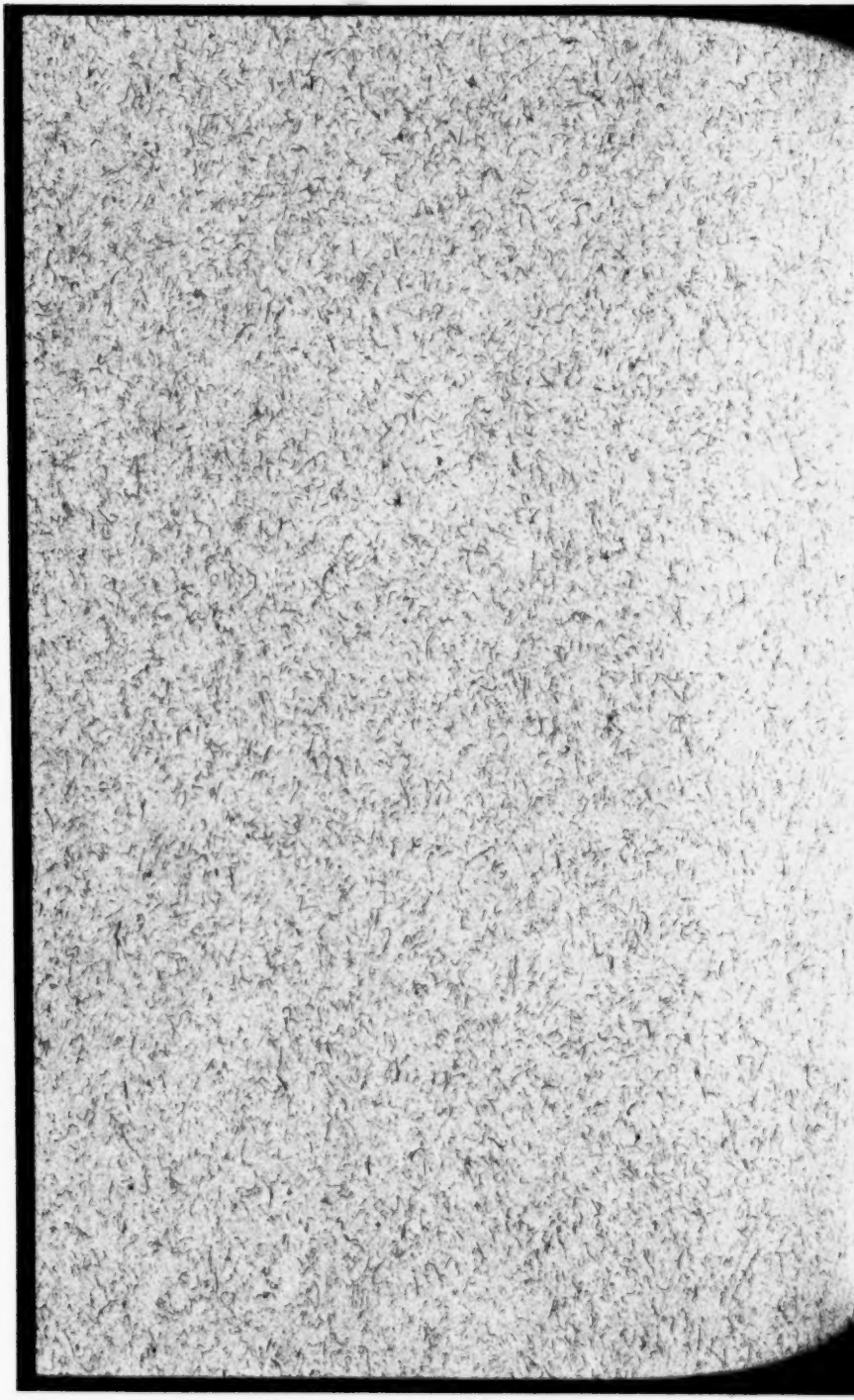

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REASONS FOR DENIAL OF WRIT.

1. Petitioner's Failure to Request an Instruction Limiting the Applicability of Section 1 of the Safety Appliance Act to the Engineer Alone, or, to Object to the Trial Court's Instruction as to Application of the Air Brakes by the Conductor, Precludes A Claim of Error on Appeal. Rule 51, Fed. Rules Civil Procedure.

The Petitioner, on appeal, for the first time, sought to limit the application of Section 1 of the Safety Appliance Act, relating to air brakes, to use by the engineer. Having failed to raise this, pursuant to Rule 51, Federal Rules Civil Procedure, 28 U. S. C. A., by timely objection to the granting of Plaintiff's Prayer for Instruction No. 1, or, objection at the conclusion of the Court's charge, and, par-

ticularly, where the Petitioner did not offer any request for an instruction attempting to limit Section 1 in the manner it now seeks, this afterthought comes too late.

The Bill of Complaint (R. 2), filed November 7, 1950, brought under the Federal Employers' Liability Act and the Safety Appliance Act (Paragraph Second), alleged the Plaintiff's injuries were due to a violent stop when the conductor applied the brakes from the caboose (Paragraph Eighth, R. 3), because of the inefficiency of said air brakes (Paragraph Ninth (c), R. 3, 4). The Petitioner admitted the train was stopped by the conductor by applying the brakes from the caboose (Answer, Paragraph 8, R. 5), but denied liability generally under the Federal Employers' Liability Act and the Safety Appliance Act, setting up special defenses of sole and contributory negligence on the part of the Plaintiff (R. 6).

On June 5, 1951, at the pre-trial conference, it was stated (R. 6):

> "The contentions of the parties are concisely but adequately set forth in the Complaint and Answer."

This was signed by the attorneys for both parties (R. 7).

At a discussion with the Trial Court and Counsel for the Petitioner and Respondent, before any testimony was taken, for the purpose of apprising the Court of the basis of the Respondent's claim as well as points of defense, Petitioner's counsel made the following statement (R. 13):

> "I think there is a difference between the requirements of this Section and the requirements under the hand brake section where the statute itself actually says it shall be equipped with an efficient hand brake, but, for all intents and purposes, we admit that the brakes with which the train is equipped must be in good and proper working order to satisfy the requirements of the statute."

Testimony produced by the Respondent, relating to the Safety Appliance Act, was limited to those facts deemed

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necessary to prove its case under Section 1, based on the interpretation of the Act by both counsel. It is assumed the Trial Court's rulings were made in the light of the understanding by both counsel and the Court.

No where during the entire course of the trial did the Petitioner attempt to make the limitation it now seeks—had it done so, the Respondent could have offered evidence to show that the two conductor's valves (R. 74) are used constantly for the stopping of trains and are standard equipment on cabooses; that all freight cars have one angle cock on each end (which are frequently used to stop trains on movements where cars are being pushed and the engineer cannot see the leading car), and therefore, there were 224 angle cocks on this particular train, any one of which could have been used to operate the air brake system and stop the train. It might also have been shown that every passenger coach now in use, has a conductor's valve operated by a cord which is used by the conductor to stop the train by means of the air brakes.

It is not believed the failure of counsel for either party to find cases where this precise question before the Court has been decided, is a coincidence, but the recognition that no such narrow construction was intended or would be permitted by the Courts. Apparently, numerous counsel for the Petitioner shared in this belief until they filed their Brief on Appeal.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477 (1943), the Supreme Court, speaking through Mr. Justice Douglas, at page 483, said:

> "* * * In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

The Appellate Court, through Judge Fahy, (R. 246) said:

> "As indicated, no such objection was specified below, and accordingly, it might well be argued, under Rule 51 of the Fed. R. Civ. P., that review of this alleged error is not available to appellant. See Palmer v. Hoffman, 318 U. S. 109 (1943); Frasca v. Howell, 87 U. S. App. D. C. 52, 182 F. 2d 703, 704 (1950); Ersler v. T. F. Schneider Corp., 88 U. S. App. D. C. 371, 188 F. 2d 1022 (1951). But the importance to the law of the case of an accurate instruction on the Safety Appliance Act leads a majority of the Court to scrutinize the instruction given for possible error. Montgomery v. Virginia Stage Lines, — U. S. App. D. C. —, 191 F. 2d 770 (1951).

See also Federal Practice and Procedure, Barron and Holtzoff, (1950) Rule 51, Section 1103, page 797.

The Petitioner preserved its right to object to the Trial Court's instruction on the ground "efficiency" rather than "defective" was used, but, beyond this, it cannot go.

2. Even had Petitioner Complied with Rule 51, Federal Rules Civil Procedure, the Trial Court Could Not Have Precluded the Jury from Considering a Violation of the Safety Appliance Act, When the Air Brakes were Operated by the Conductor from the Caboose.

Because of the preliminary question raised under Rule 51, Federal Rules Civil Procedure, the Respondent feels it will not be necessary for the Court to consider the Petitioner's principal contention under this heading, viz: air brakes do not have to operate safely for anyone but the engineer. Should the Court, however, wish to consider this matter, it will be found the wording of Section 1, its historical background, the purpose and intent of Congress, and the construction placed upon the Safety Appliance Act by this Court, conclusively negative the Petitioner's restrictive construction.

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An analysis of Section 1, shows it to be divided into two parts:

> "It shall be unlawful for any common carrier engaged in Interstate Commerce by railroad, to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake *and appliances for operating the train brake system,* OR to run any train in said traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on a locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose." (Italics supplied.)

The first part requires a power driving wheel brake and appliances for operating the *train brake system,* and, the second part requires a sufficient number of cars in a train equipped with power or train brakes, to enable the engineer to control its speed without requiring the brakeman to use the hand brake.

As to the first part, if a locomotive is being used in moving "interstate traffic", it can only mean, being used in furnishing motive power for the movement of cars. "Appliances for operating the train brake system" cannot be limited to the locomotive engine alone, for the reason that each and every part of the train brake system fits together in an inseparable pattern, which can only function as an integrated apparatus. If the triple valve on a car is bad, the train brake system will not function properly, whether it be the triple valve on the car next to the engine or on the 100th car (R. 94 and 95); if there is an abnormal leakage in the train line, by which means air passes from the engine to the last car through pipes and hoses, sufficient air pressure cannot be maintained to operate the train brake system, "and would constitute an inefficient braking system" (R. 143); or, if there is a leak in any one of the conductor's valves in the caboose (part of the train line equipment, R. 110), it will affect the operation of the train brake system (R. 111).

The second requirement of Section 1 would be violated if the required percentage[1] of cars in a train were not equipped with power or train brakes to enable the engineer drawing such train to control its speed.

The first portion of Section 1 requires an engine moving an interstate train to have appliances for operating the *train brake system.* Limiting "appliances" to the engine alone, would lead to this absurd result—if the engine had proper compressors, valves, etc., which pump the air through the train, but, because of a leaky appliance in the train, is unable to build up sufficient pressure to operate the brake system, there could be no violation of the Act because the engine was properly equipped, even though its air could not be utilized because of a defective appliance in the train. This would also be true whether the brakes were operated by the engineer or not.

This anomalous result is avoided by the requirements of the Safety Appliance Act, divided by the words "and" and "or", which mean: the locomotive would have to have those requirements set forth; the cars in the train would have to have appliances to enable the engineer to utilize the compressed air supplied by the engine compressors in operating the brakes; that a sufficient number of cars (85% by I. C. C. regulation) would be required to be equipped with power or train brakes to enable the engineer to successfully utilize the requirements of the first part. Therefore, by recognizing the parts of Section 1 as imposing separate requirements, the literal language of Section 1 is utilized in enunciating Congressional intent.

---

[1] I. C. C. Regulation, June 6, 1910: It is ordered, That on and after Sept. 1, 1910, on all railroads used in interstate commerce, whenever, as required by the safety appliance act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

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The framers of Section 1 used the word "and" betwe
that part requiring power driving wheel brake and th
part requiring appliances for operating the train-bra
system. The use of the word "and" had one purpose
that, of making separate requirements. After the portio
requiring appliances, they used the word "or" and follo
ing this, a requirement which relates to the percentage
cars necessary to be equipped with power or train brak
to enable the engineer to control the speed by the use
air brakes. The use of the word "or" was deliberate, wi
the obvious intent of making a failure to observe either
the requirements of Section 1 an unlawful act.

If it were felt the parts of Section 1 were inseparabl
an unintended result would occur by adhering to the liter
language. The air brake system would be outside of th
Safety Appliance Act, when, for instance, the engine, in
stead of "drawing" the train, was "pushing" the train
The same result would occur if the fireman was operatin
the locomotive (as he is required to do in order to qualif
for an engineer), or, if a hostler (who habitually move
engines in the yard) would be operating the engine, be
cause he would not be the locomotive engineer.

Since no other Section of the Safety Appliance Act re
lates to the operation of air brakes, it could hardly be con
tended that Section 1 was not intended to be inclusive.

The Interstate Commerce Regulations, supra, points ou
the Congressional intent, by stating:

> "• • • that to more fully secure the objects of the ac
> to promote the safety of employees and travelers o
> railroads, the minimum percentage of power brak
> cars to be used in trains, as established by its orde
> of Nov. 15, 1905, should be further increased • • • ."

To the same effect is the case of *Coray* v. *Southern Pac*
Co., 335 U. S. 520, 69 S. Ct. 275 (1949), in which this Court
speaking through Mr. Justice Black, at p. 276, said:

> "• • • An abrupt or unexpected stop due to bad
> brakes might be equally dangerous to employees and

others as a failure to stop a train because of bad brakes. And this act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances."

There is no testimony that conductor's valves are not standard equipment on all cabooses. It is definitely a part of the *braking system* of the train. Every member of the crew has to be familiar with the operation of air brakes and use it every day (R. 37). The same air that is pumped into the train line by the compressors on the engine, passes all the way back to the caboose (R. 37). Any leakage in the conductor's valve on the caboose would be a leak in the brake system and would thereby prevent the engineer from getting proper pressure to apply the brakes (R. 111).

There is no evidence that these valves are supplied and used solely as an emergency device; in fact, they are usually referred to as *conductor's valves.* They are also used by the conductor or brakemen on reverse movements, and have a whistle so that the operator, whether it be a brakeman or conductor, can sound the whistle as the train is being shoved across a road crossing (R. 46). Could it be contended that, in such a reverse movement, when the engineer may not, because of the track curvature or obstructions, be able to see the leading or first car, the Safety Appliance Act does not require safe operation of the air brakes from the rear?

The function of conductor's valves becomes increasingly important in the light of surprising testimony that there is no means of communication between the engineer and the crew in the caboose and vice versa (R. 77). Where the crew in the cupola of the caboose observe an unusual condition, it being their duty to do so under existing rules (R. 3, 5), the only means the conductor and brakemen in the caboose have of doing something about a dangerous condition is the application of the brakes from the rear of the train by means of the conductor's valve.

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The Petitioner contends (P. 9) that the significance of the specificity of the requirements of the Safety Appliance Act is obvious, and denies that the words used by Congress are susceptible of a construction beyond their plain meaning. An examination of Section 1 of the Act shows no specification of the equipment required. There couldn't be, because the Act was passed in 1893, which was before most modern improvements to air brake equipment were available. Section 1, however, is as inclusive as can be, viz: "appliances for operating the train-brake system." What appliances are required is not specified, but these requirements would change with the advent of new equipment. It is difficult to follow a contention which has for its basis, the proposition that three conductor's valves in its caboose, cannot be part of the "appliances for operating the train brake system."

There can be little doubt that the case of *Coray* v. *Southern Pac. Co., supra,* is controlling in the present case. In that case, suit was brought in the Utah State Court under the Safety Appliance Act and Federal Employers' Liability Act for the decedent's death, when a motor car operated by him crashed into the rear of an 82 car freight train, both being operated in the same direction. The train unexpectedly stopped just before the crash, because the air in its brake line escaped and locked the brakes, due to the fact that threads on a *valve* were so badly worn that a nut became disconnected. As a result of the sudden stop, the motor car, which was several hundred feet in the rear of the freight train, crashed into it. The decedent, operating the motor car, did not apply the brakes, as he and another employee were looking back toward a block signal. The trial court directed a defendant's verdict, which was affirmed on appeal. The Supreme Court of the United States, in reversing, through Mr. Justice Black, at p. 276, said:

> "First. We cannot agree with the State Supreme Court's holding that although the railroad ran its

> train with defective brakes, it thereby 'violated no duty owing' to the decedent. That Court said that the object of the Safety Appliance Act 'insofar as the brakes might be concerned, is not to protect employees from standing, but from moving trains.' We do not view the Act's purpose so narrowly. It commands railroads not to run *trains* with defective brakes. An abrupt or unexpected stop due to bad brakes might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances." (Italics supplied).

The Petitioner (P. 10) attempts to distinguish *Coray* from the present case on the theory that the defective equipment deprived the engineer on the locomotive of his ability to control the train. The fact is, however, that in the *Coray* case, the stoppage of the train was not caused by the application of the brakes by the engineer, but, because of a defective *valve*, causing the air to leak out and creating an emergency stop without any overt act on the part of the engineer. In the instant case, a service or normal stop was intended, but because of the defective and inefficient braking system, a rough or emergency stop resulted.

3. Trial Court Did Not Err in Its Instruction to the Jury on the Question of the Efficiency of the Air Brakes.

The Petitioner now contends (P. 12) that the only requirement under Section 1 is that the specified equipment be *not defective* and that air brakes are not required to be efficient—the word "efficient" being a word of art used only in Section 11 of the Act, which requires efficient hand brakes. The Petitioner, in a discussion with the Trial Court, said, supra:

> "I think there is a difference between the requirements of this section and the requirements under the hand

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> brake section, where the statute itself actually says it shall be equipped with an efficient hand brake but, for all intents and purposes, we admit that the brakes with which the train is equipped must be in good and proper working order in order to satisfy the requirements of the statute.

If there was any difference between the requirement that the air brake system be free of defects and be in good and proper working order, and, the requirement that they be efficient, the Petitioner has not made this differnce known. Simply calling the word "efficient" a word of art does not make it an obscure or mystic term. The Supreme Court did not so regard it in the case of *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334 (1947), where, through Mr. Justice Burton, at page 1338, it was said:

> " * * * Where a jury finds that there is a violation, it will be sustained if there is proof that the mechanism failed to work efficiently and properly even though it worked efficiently both before and after the occasion in question. The test in fact is the performance of the appliance. *Efficient means adequate performance; producing properly a desired effect. Inefficient means not producing or not capable of producing the desired effect; incapable; incompetent, inadequate.*
>
> *The inefficiency of the brake in this case may have consisted of its defective condition or its defective functional operation* resulting, in either case, in its knocking from the brake platform an experienced railroad man attempting to tighten or set the brake in the customary manner described in his testimony." (Italics supplied.)

It would seem the *Myers* case, decided by the Supreme Court in 1947, is a sufficient reply to the Petitioner's citation of *Thayer* v. *Denver & R. G. R. Co.*, 25 N. M. 599, 185 Pac. 542 (1919).

Hand brakes are utilized principally when the cars are individually controlled and "to stabilize a car on the track

or siding" (R. 79). Yet, in this simple operation, Section 11 requires that hand brakes be efficient. Could it be said that Section 11, covering the operation of hand brakes, is more important than the effective control by air brakes of an entire train?

The Myers case is the last Supreme Court case and one of many which have uniformly held that one way of showing an inefficient brake is to show that it failed to function in the usual way when applied in the usual and customary manner. In the instant case, not only was the brake shown to be "inefficient" in that it did not operate in the manner intended when applied in the usual manner, as evidenced by the rough and violent stop, but the reasons for this failure were supplied by the Petitioner. Mr. Reid testified 80 pounds of air was required to operate the new diesel braking system and that he had 80 pounds when leaving Richmond (R. 109), whereas everyone else including the inspectors charged with the duty of seeing that the train line pressure was proper, thought only 70 pounds was required (R. 38, 90, 215) and Petitioner's engine inspection reports all show a 70 pound pressure reading. Mr. Florence, the front brakeman, testified that when leaving Richmond, they had a fraction less than sixty pounds of air on the diesel (R. 90); so, instead of the ten pounds below the required braking pressure, they had, in fact, twenty pounds less than the amount Mr. Reid said was required. Mr. Carlson, the Petitioner's expert, testified that abnormal brake pipe leakage would account for a differential between the front and rear and would cause a rough stop (R. 143, 144). It therefore appears the braking system was *inefficient and defective* when the train started out from Richmond, immediately following the so-called inspection.

The Petitioner contends that in like manner (R. 13) Section 2 of the Act, dealing with automatic couplers, specifically requires that the couplings couple automatically by impact; that ladders, handholds and grab-irons are re-

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quired by Section 11 to be secure, but that no such particularization appears in Section 1, the air brake section. In the case of *O'Donnell* v. *Elgin, J. & E. Ry. Co.*, 338 U. S. 384, 70 S. Ct. 200 (1949), the Court through Mr. Justice Jackson, at page 203, said:

> "A close and literal reading of the Safety Appliance Act, 45 U. S. C. Sec. 2, 45 U. S. C. A. Sec. 2, suggests that two functions only are required of couplers; that they couple automatically by impact and that they uncouple without requiring men to go between the ends of the cars.
>
> * * *
>
> We find it difficult to read the Safety Appliance Act to require that cars be equipped with appliances which couple automatically by impact and which may be released without going between the ends of cars, but which need not remain coupled in the meantime.
>
> * * *
>
> As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care were to be considered on the question of this liability."

The Supreme Court did not stop with a close and literal reading of the Safety Appliance Act, but interpreted the coupler section in light of congressional intent and obvious purpose.

Section 2 is construed to mean not only couplers which couple on impact, but also couplers which remain coupled and which will not unintentionally come uncoupled at any time, and, the fact that they may operate most of the time or be efficient most of the time is not enough. *Affolder* v. *New York, C. & St. L. R. Co.*, 339 U. S. 96, 70 S. Ct. 509 (1950), *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U. S. 430, 70 St. Ct. 226 (1949). In the *Affolder* Case, Mr. Justice Clark, at page 510 says:

> "Nor do we think that any question regarding the normal *efficiency* of the couplers is involved in an action under the Safety Appliance Acts. As we said in O'Donnell v. Elgin, Joliet & Eastern R. Co. 1949, 338 U. S. 384, 70 S. Ct. 200, and the Carter case, 338 U. S. 430, 70 S. Ct. 226, the duty under the Acts is not based on the negligence of the carrier, but is an absolute one requiring performance "on the occasion in question." (Italics supplied.)

The term "efficiency" does not appear in Section 2; nevertheless in the *Affolder* case, the opinion states that even "normal efficiency" is not involved—meaning efficiency is required on all occassions and at all times.

The efficient operation of air brake equipment has become increasingly important as the length of trains increased. When Section 1 was passed in 1893, freight trains of over a dozen cars in length were a rarity. Since that time, with the new powerful diesels, they have increased tremendously in length. In the instant case, the train consisted of 112 cars, over a mile and a quarter in length (R. 77). The brakes of a train of this size are operated by the air supplied by compressors on the engine, which is pumped through the pipes and hoses, called a train line, and the same train line carrying the air operates the brakes on the first car as well as on the 112th car. It would be difficult to visualize anything more important in the control of a train of this length, moving at high speed, than air brakes which would operate properly and efficiently under all conditions, including operation from the rear.

The Petitioner apparently realizes that the case of *Myers* v. *Reading, supra,* disposes of its contention that the air brake system need not be efficient, and attempts to avoid the impact of that case by saying it was only concerned with Section 11, which uses the phrase "efficient" hand brakes; however, the opinion gives the definition of "efficient" as well as "inefficient" and does not limit it to the so-called word of art contained in Section 11.

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4. The Precise Questions Now Raised Were Authoritatively Decided by the Court of Appeals After Careful Analysis and Consideration.

The Petitioner contends that the precise question presented is one of first impression, by taking the first part of a sentence of the majority opinion, separating it from the remainder of the sentence, and using the part extracted as his first reason for granting the writ (P. 8)—the inference being that only superficial thought or reasoning was used in arriving at the opinion. It would seem that a sufficient answer to this, would be the reading of the entire sentence, as it appears on (R. 247-248), which is as follows:

> "While the precise question presented is one of first impression, this construction seems to conform with the approach of the Supreme Court as evidenced, for example, by Coray v. Southern Pacific Co., 335 U. S. 520 (1949) where a narrow construction of the Act was avoided. The Act is to be liberally construed in keeping with its purpose, Lilly v. Grand Trunk Co., 317 U. S. 481, 486 (1943), namely, to promote the safety of trains and of persons and property therein. N. Y. Central R. R. v. United States, 265 U. S. 41, 44-45 (1924)."

A study of the entire opinion shows it to be careful, scholarly and logical.

5. The Supreme Court has Granted Certiorari in Safety Appliance Cases Only Where the Decision of the Trial and Appellate Courts Restricted Its Application.

In *Myers* v. *Reading Co., supra,* Myers was injured as a result of being thrown off a car while applying a hand brake. The jury returned a verdict for Myers, which was set aside by the trial court and a verdict n.o.v. entered. This was affirmed by the Circuit Court of Appeals, 155 F. 2d, 523, which agreed with the conclusion of the District Court that the Plaintiff, as a matter of law, had failed to make out a case under the Statute. The Supreme Court, in reversing, through Mr. Justice Burton, at p. 1339, said:

"Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

In the case of *Coray* v. *Southern Pac. Co., supra,* involving air brakes, the Supreme Court, through Mr. Justice Black, at p. 276, said:

"We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes it thereby 'violated no duty owing' to the decedent. That court said that the object of the Safety Appliance Act, 'insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains.' The obvious importance of the restrictive interpretation given to the two federal Acts prompted us to grant certiorari."

In the case of *O'Donnell* v. *Elgin, J. & E. Ry. Co., supra,* where O'Donnell was killed as a result of cars breaking loose, the Court of Appeals sustained the refusal of the trial court to charge the jury that the breaking of the coupler was negligence per se. The Supreme Court, in reversing, through Mr. Justice Jackson, at p. 206, said:

"As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care were to be considered on the question of this liability."

In *Carter* v. *Atlanta & St. Andrews Bay Ry. Co., supra,* the petitioner was injured when he ran after a car which failed to couple, and, while on it, the car was struck by the balance of the train which came against it and coupled. The trial court granted a directed verdict on the ground the coupler worked previously and subsequently and that there was no proof of any defect, which was affirmed on appeal, on the theory that the failure to couple on the first

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impact was the remote and not the proximate cause of the plaintiff's injury. The Supreme Court, in reversing, through Mr. Justice Clark, at p. 229, said:

> "The fact that the coupler functioned properly on other occasions is immaterial."

In *Affolder* v. *New York, C. & St. L. R. Co., supra,* Affolder ran after a 'cut' of cars which failed to couple, falling under them and losing his leg in the attempt. The Petitioner claimed the failure of the cars to couple was a violation of the Safety Appliance Act, while the Respondent claimed the criterion was whether the cars were equipped with efficient couplers and not whether they failed to couple, and even if there was a violation, it was not the proximate cause. Judgment for the plaintiff was reversed on appeal. The Supreme Court in reversing, through Mr. Justice Clark, at p. 510, said:

> "We think the Court of Appeals erroneously concluded that the jury could find for the plaintiff only if it inferred 'bad condition of the couplers and consequent violation of defendant's statutory duty * * *. This was the same error the Court of Appeals for the Seventh Circuit made in O'Donnell, supra, in an opinion relied upon by respondent in the present case."

CONCLUSION.

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

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